THE SUPREME COURT OF APPEAL SOUTH AFRICA

JUDGMENT

Case No: 344/09

In the matter between:

DEON VAN JAARSVELD **Appellant**

and

SUNETTE BRIDGES **Respondent**

Neutral citation: *Van Jaarsveld v Bridges* (344/09) [2010] ZASCA 76 (27 May 2010)

Coram: Harms DP, Nugent and Van Heerden JJA and Majiedt and Seriti AJJA

Heard: 11 May 2010

Delivered: 27 May 2010

Summary: Breach of promise to marry – causes of action – compatibility with present-day public policy discussed – wrongfulness – damages

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ORDER

On appeal from: North Gauteng High Court (Pretoria) (Raulinga J sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel.
2 The order of the court below is amended to read: 'Absolution from the instance with costs'.

JUDGMENT

HARMS DP (NUGENT and VAN HEERDEN JJA and MAJIEDT and SERITI AJJA concurring)

INTRODUCTION

[1] This appeal relates to a claim for damages instituted by the respondent, Ms Sunette Bridges, against the appellant, Mr Deon van Jaarsveld, on the ground of a breach of promise to marry. The claim was upheld by the court below and it awarded an amount (in the words of the learned judge) of 'only' R110 000 in relation to iniuria. In addition it awarded R172 413 in respect of contractual damages. The award carried mora interest and costs.

[2] The court below granted leave to appeal against its order but limited the issues on appeal to quantum. This court, however, notified the parties that it wished to hear argument on other relevant issues and decided to broaden the scope of the appeal.[1] The one issue concerned the question whether the breach was contumacious – a requirement for delictual damages. The other arose from a dictum by Davis J in *Sepheri v Scanlan* 2008 (1) SA 322 (C) at 330I-331A:

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[1] *Douglas v Douglas* [1996] 2 All SA 1 (A) at 8-9; *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23C-G.

'In general I would agree with these views, namely, that our law requires a reconsideration of this particular action. It appears to place the marital relationship on a rigid contractual footing and thus raises questions as to whether, in the constitutional context where there is recognition of diverse forms of intimate personal relationships, it is still advisable that, if one party seeks to extract himself or herself from the initial intention to conclude the relationship, this should be seen purely within the context of contractual damages.'

[3] Courts have not only the right but also the duty to develop the common law, taking into account the interests of justice and at the same time to promote the spirit, purport and objects of the Bill of Rights.[2] In this regard courts have regard to the prevailing mores and public policy considerations.[3] Davis J felt the time had come for a reconsideration of the action but felt uncomfortable to take a lead in the matter. However, having had regard to the views expressed by the authors quoted by the learned judge (at 329G-I and 300H-I)[4] to which can be added an incisive article by J M T Labuschagne,[5] I do believe that the time has arrived to recognise that engagements are outdated and do not recognise the *mores* of our time, and that public policy considerations require that our courts must reassess the law relating to breach of promise. In what follows I intend to give some guidance to courts faced with such claims without reaching any definite conclusion because this case is not affected by any possible development of the law and can be decided with reference to two factual issues, namely, in relation to iniuria, whether the breach was contumacious and, secondly, whether Bridges has suffered any actual loss as a result of the breach.

[4] A breach of promise may give rise to two distinct causes of action.[6] The one is the *actio iniuriarum*. The 'innocent' party is entitled to sentimental damages if the repudiation was contumelious. This requires that the 'guilty' party, in putting an end to the engagement, acted wrongfully in the delictual sense and *animo iniuriandi*. It does not matter in this regard whether or not the repudiation was justified. What does matter is the manner in which the engagement was brought to an end. The fact

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[2] *Linvestment CC v Hammersley* [2008] 2 All SA 493 (SCA) para 25; Constitution s 39(2).
[3] For example *Hurwitz v Taylor* 1926 TPD 81.
[4] Van der Heever *Breach of Promise and Seduction in South African Law* (1954) p 120; June D Sinclair *The Law of Marriage* vol 1 (1996) p 313; D J Joubert 'Die gevolge van troubreuk – 'n kontemporêre beskouing' 1990 (23) *De Jure* 201, especially p 213-215.
[5] 'Deïnjuriëring van verlowingsbreuk: Opmerkinge oor die morele dimensie van deliktuele aanspreeklikheid' 1993 (26) *De Jure* 126.
[6] *Guggenheim v Rosenbaum (2)* 1961 (4) SA 21 (W) at 36.

that the feelings of the 'innocent' party were hurt or that she or he felt slighted or jilted is not enough. I shall revert to this issue.

[5] The second cause of action is for breach of contract. Two aspects arise for discussion. The first is that an engagement may be cancelled without financial consequences if there is a just cause for the cancellation. Just cause is usually defined as any event or condition or actions *of the other party* which would jeopardise a long and happy marriage and which can induce any right-minded member of society to rescind the engagement.[7] The origin of this restricted meaning is to be found in Canon Law and Germanic Law influences at a time when churches controlled the lives of people, when a woman was deemed to be of a lower status than a man, and when a party to a promise to marry could be obliged to marry by an action for specific performance.

[6] The world has moved on and morals have changed. Divorce, which in earlier days was available in the event of adultery or desertion only, is now available in the event of an irretrievable breakdown of the marriage. Guilt is no longer an issue. There is no reason why a just cause for ending an engagement should not likewise include the lack of desire to marry the particular person, irrespective of the 'guilt' of the latter. Unwillingness to marry is clear evidence of the irretrievable breakdown of the engagement. It appears illogical to attach more serious consequences to an engagement than to a marriage.

[7] The second aspect that has to be considered in the context of contractual damages is the justification for placing an engagement on a 'rigid contractual footing'.[8] It is difficult to justify the commercialisation of an engagement in view of the fact that a marriage does not give rise to a commercial or rigidly contractual relationship.

[8] I do not accept the proposition that parties, when promising to marry each other, contemplate that a breach of their engagement would have financial consequences as if they had in fact married. They assume that their marital regime will be determined by their wedding. An engagement is in my view more of an

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[7] Schafer *Family Law Service: Law of Marriage* p 13
[8] Compare *Bull v Taylor* 1965 (4) SA 29 (A).

unenforcable *pactum de contrahendo* providing a *spatium deliberandi* – a time to get to know each other better and to decide whether or not to marry finally.

[9] One has to distinguish in this regard between claims for prospective losses and those for actual losses. It is not easy to rationalize claims for prospective losses. One of the problems concerns the intended marital regime. It would be unusual for parties to agree on the marital regime at the time they promise to marry each other. If nothing was agreed, on what assumption must the court work? I believe that the court cannot work on any assumption, especially not one that the marriage would on the probabilities have been in community of property. And if the agreement was to marry in community, can one party not change her or his mind without commercial consequences?

[10] An agreement to enter into an antenuptial contract is not binding because it must be entered into notarially. How can legal consequences flow from the refusal to enter into the notarial agreement? And what would the consequences be if the parties cannot agree on the detailed terms of the agreement? The matter becomes more complicated if one considers the claim for loss of support. In divorce proceedings the award is a matter of discretion; but in a breach of contract situation it becomes a matter of commercial entitlement. Imponderables abound. Prospective losses are 'not capable of ascertainment, or are remote and speculative, and therefore not proper to be adopted as a legal measure of damage'.[9] They depend on the anticipated length of the marriage and the probable orders that would follow on divorce such as forfeiture and the like. I do not believe that courts should involve themselves with speculation on such a grand scale by permitting claims for prospective losses.

[11] Claims for actual losses are easier to justify but difficult to rationalize in terms of ordinary principles relating to the calculation of damages in the case of breach of contract. What usually springs to mind are costs or losses incurred by agreement, actual or by necessary implication, between the parties, such as those relating to wedding preparations. These losses do not flow from the breach of promise *per se* but from a number of express or tacit agreements reached between the parties

[9] *Holt v United Security Life Insurance & Trust Co* (1909) 72 Atlantic Reporter 301 quoted in *Mainline Carriers (Pty) Ltd v Jaad Investments CC* 1998 (2) SA 498 (C) para 44.

during the course of their engagement. To be recoverable, the losses must have been within the contemplation of the parties. The 'innocent' party must be placed in the position in which she or he would have been had the relevant agreement not been concluded; and what the one has received must be set of against what the other has paid or provided.[10] Another example would be losses suffered by one, who in agreement with the other, relinquishes a post in anticipation of the wedding and is unable to find another post. Bridges, it might be mentioned, based her claim for financial losses on exactly this footing.

THE DELICTUAL CLAIM

[12] The parties were engaged on 29 July 2005. The wedding was set for 14 January 2006. Van Jaarsveld, by text message (sms), notified the appellant on 4 December 2005 that he was no longer prepared to go ahead with the wedding. (Although the parties had telephonic contact their usual mode of communication was by sms.) He wrote that he was sorry about his decision but he could not lie. He did not feel the same as before. He could not marry her in the light of his present feelings and that he could not bluff himself. He added that he knew that her mother would read the sms and he also apologised to her. He concluded by saying that Bridges was ''n pragtige mens' and once again expressed his regret. This sms was preceded by an email sent to Bridges earlier that day during which he expressed his doubts about the wedding. She responded by email, requiring of him to make up his mind. He responded by sending the said sms. But he vacillated the next day when indicated to her by sms that she should post the invitations. However, a day later on 6 December he informed her in these terms that he was unable to proceed with the wedding:

'Ek is so jammer dat ek alles so ver laat gaan het, ek is jammer as ek jou seer maak, maar ek is nie opgewonde nie en dis nie reg nie. Ek kan nie met jou trou nie.'

[13] Bridges accepted the repudiation with alacrity and on 9 December her attorneys sent him a letter of demand claiming damages in excess of R1m. Summons was issued during February 2006, claiming damages of R678 203.08. She also issued summons against his mother but that matter did no proceed.

[10] Compare *Probert v Baker* 1983 (3) SA 229 (D) at 234C-235E.

[14] It is necessary to revert to the beginning. Bridges calls herself a singer in the particulars of claim but she is also a lyricist and promoter and sees herself as a potential radio and television personality. She had a relatively successful career but her success was in part due to the fact that she was the daughter of her father, Mr Bles Bridges, a well-known romantic singer who had died a few years ago, and the business of her last husband.

[15] She also had some marriages behind her. While married to her fourth husband her 'involvement' with Van Jaarsveld commenced. She also had two children. Not without relevance is the fact that within less than a month and before summons had been issued she already had a new paramour.

[16] Van Jaarsveld was younger and a bachelor. He farmed on a family farm. He had no claim to the farm but only the expectation of inheriting the farm or part thereof. His family, particularly his mother, was not thrilled with the relationship, especially Bridges' track record with husbands. She disliked Bridges' values and regarded her dress code as immodest. There was a deep clash of principles. She also thought that Bridges wished to marry her son for money, which apparently belonged to the family business and not to him.

[17] By the very nature of her career and her many husbands, Bridges' involvement with Van Jaarsveld attracted media attention and she willingly gave a number of interviews, even before their engagement, about their relationship and her expectation that things would be different this time round. She was not going to be another Elizabeth Taylor, she said. Her engagement also led to further newspaper interviews and reports. They all speculated about the chances of success of the fifth marriage.

[18] Bridges was aware of the fact that she was not acceptable to his family, and she put him to a choice: either his mother or her. His mother, especially, put him before a starker option: either Bridges and no farm or an end to the relationship. This gave rise, it would appear, to heated arguments between him and Bridges and him and his family, as well as to mood swings and indecisiveness about marrying or not. As appears from his emails, he realised that a marriage could not be a success in the circumstances, and he consequently terminated the engagement.

[19] A breach of promise can only lead to sentimental damages if the breach was wrongful in the delictual sense. This means that the fact that the breach of contract itself was wrongful and without just cause does not mean that it was wrongful in the delictual sense, ie, that it was injurious.[11] Logically one should commence by enquiring whether there has been a wrongful overt act. A wrongful act, in relation to a verbal or written communication, would be one of an offensive or insulting nature. In determining whether or not the act complained of is wrongful the Court applies the criterion of reasonableness. This is an objective test. It requires the conduct complained of to be tested against the prevailing norms of society. To address words to another which might wound the self-esteem of the addressee but which are not, objectively determined, insulting (and therefore wrongful) cannot give rise to an action for *injuria.* Importantly, the character of the act cannot alter because it is subjectively perceived to be injurious by the person affected thereby.

[20] Applying that test it appears to me to be clear that neither sms was objectively insulting or contumacious. That ought to be the end of the inquiry. However, Bridges' main complaint was the fact that since the engagement was news the calling off of the wedding made newspaper headlines. I fail to see how this could be injurious. It would have meant that Van Jaarsveld would never have been able to cancel the engagement without committing an iniuria. Her reputation was such that anything about her amatory life would have been newsworthy. Her divorces, too, were news but that could not have given rise to claims for damages. Importantly, according to the first newspaper report the news about the cancellation came from one of her friends. There is no suggestion that Van Jaarsveld had advertised the fact.

[21] Her second complaint was that he did not end the relationship during a face-to-face meeting but chose to hide behind an sms. Once again, I fail to discern any contumacy in his use of an sms. They were part of a series between the parties building up to the inevitable. It was their normal manner of communication. A face-to-face meeting would have ended in recriminations and a confrontation about his family. The tone was also one of self-recrimination and was apologetic – the typical 'it is about me and not about you'. He even apologised to her mother.

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[11] *Ndamase v University College of Fort Hare* 1966 (4) SA 137 (E) at 139G-140C. In what follows I am paraphrasing the words of Smalberger JA in *Delange v Costa* 1989 (2) SA 857 (A) at 861-862.

[22] The third complaint concerned the interview Van Jaarsveld had with a newspaper after the action had been instituted. She had, apparently, already spoken to the media about their break-up towards the end of January. He sought to defend himself and his family against a number of rumours. He added that their problems began about the cost of the wedding and his inability to finance it, something she denied. That she had an expensive wedding in mind is clear from a newspaper report shortly after the engagement. Read in context of litigating parties the newspaper report does not appear to me to be derogatory and it did not establish any injurious intention on his part.[12] It is also not appreciated how a non-contumacious breach could become injurious because of later events that, in themselves, are not injurious.

[23] It is unnecessary to deal with the other makeweight arguments. The court below found that she was 'very extravagant in character and language' and 'to say the least, she was hyperbolic in her testimony'. In the light of her history, her quick recovery in the arms of another, her eagerness to claim damages, Van Jaarsveld's uncertainty about their future, the lack of prospects of a happy marriage on the farm, and the bad relationship with her future in-laws, convince me that any injury or contumacy was *de minimis* and can be discounted, and that the claim based on iniuria should have been dismissed.

FINANCIAL LOSSES

[24] The court below awarded R137 316 for her loss of income for the year subsequent to the intended marriage. Her case was that in view of the fact that she would have become a housewife after the wedding she scaled her commitments for performances for the year 2006 down. Her estimated loss of income, she said, amounted to the said amount

[25] There are many problems with her evidence in this regard but it is not necessary to mention them because it is clear that she earned an amount of R200 000 that the court below did not take into account in determining her loss.

[26] On 23 January 2006, Bridges entered into an agreement with a trust represented by one Van der Westhuizen. It was called an investment and profit

[12] Compare the approach in *Sepheri v Scanlan* supra at 377H-I.

sharing agreement. The trust had to pay her R200 000, which it did immediately. She undertook to produce a CD and a DVD, to give a number of performances, to write a book, and to produce a TV programme during that year. She was not obliged to repay the money; instead she and the trust would share the income in agreed percentages and it was anticipated that the trust's basic share would exceed the amount of the outlay.

[27] Bridges did not perform as required. No credible reason for her failure was given. At the time of the trial in May 2008 the contract was still extant. She testified that the contract was a loan, which she had to repay some time or other. That is incorrect. The only claim the trust had was for a share of profit. Her failure to perform cannot be laid at the door of Van Jaarsveld. I therefore conclude that the court below had erred in not taking this amount in consideration. Had it done so her claim for loss of income would have been dismissed.

[28] The other amounts allowed by the court were the following:
(a) R12 825 for wedding preparations. The amount was overstated not only because of a mathematical error but also because the court had failed to take into account repayments of deposits. The adjusted amount is R9 000;
(b) R28 872 for wasted removal costs. She had sold her house and was about to move to the farm;
(c) R6 000 for money spent by her renovating the farm house; and
(d) R 2 400 being wasted costs in relation to the possible move of her child to a school proposed by Van Jaarsveld.

[29] The court below deducted from this the sum of R15 000 being an amount paid by Van Jaarsveld as contribution to her removal costs. The court, however, failed to have regard to a further sum of R35 500 paid by him in respect of the costs of renovation (she could only prove R4 100 on this point) and the wedding preparations. Had the court taken this amount in account in calculating her loss it could not have awarded her any damages. She could not account properly for the latter amount and this amount must in my view be set off against any damages she may have suffered. I disagree with the court below that her evidence had to be accepted uncritically on this score simply because Van Jaarsveld did not testify. He could not give evidence on how she spent the money.

[30] It follows that her claim should have been dismissed. The consequent order is:

1 The appeal is upheld with costs, including the costs of two counsel.
2 The order of the court below is amended to read: ‘Absolution from the instance with costs’.

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L T C HARMS
Deputy President

APPEARANCES

APPELLANT/S	P E Jooste (with him T Zietsman)
	Instructed by Friedman Scheckter, Port Elizabeth
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